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Supreme Court of the United States

October Term, [illegible]

No. [illegible]

Department of Mental Hygiene of the State of California,

Petitioner,

vs.

Eleanor Kirchner, Administratrix of the Estate of Ethelyn Golden Vance,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

Brief for the National Federation of the Blind and the California League of Senior Citizens, as Amicus Curiae on Behalf of Respondent.

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SUBJECT INDEX

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DEPARTMENT OF MENTAL HYGIENE OF THE STATE OF CALIFORNIA,

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Interest of Amici.

The National Federation of the Blind is a national organization of blind persons vitally interested in federal and state welfare programs. More particularly, in light of the nature of this case, it has been and is dedicated to the removal from all welfare programs of the so called "responsible relatives" provisions. The Federation's direct experience has convinced its membership that such

provisions are unfair and discriminatory and serve to defeat the purposes of welfare. The Federation believes that "responsible relatives" provisions are incompatible with the guarantees of equal protection in the Fourteenth Amendment. In 1961, the Federation saw some of its efforts rewarded in California's total elimination of "relatives responsibility" from the welfare programs embracing the blind and the disabled. Some of the other programs within the State still contain such provisions, including aid to the aged, in whose behalf the California League of Senior Citizens joins in this brief amicus.

If the decision of the California Supreme Court in the *Kirschner* case is upheld, the efforts of these organizations in California will be freed from concern with "responsible relatives" provisions so that other welfare problems can be dealt with. The Federation also believes the *Kirschner* case to be a most valuable precedent which may be found instructive in other jurisdictions where the Federation has members and is active. For all the foregoing reasons, and also because it is felt that the *Kirschner* case stirs issues of profound constitutional significance, The National Federation of the Blind and the California League of Senior Citizens desire to submit this brief in support of the respondent as friends of the Court.

Statement of the Case.

The case is adequately stated in the briefs of the parties.

Summary of Argument.

I.

This Court lacks jurisdiction because the judgment below rests on an adequate independent state ground. California's Constitution contains many different provisions dealing with and guaranteeing the equal protection of law. The judgment below was not rested on the Federal Constitution; it was based upon the California Supreme Court's authority to construe statutes in the light of its developing understanding of the needs of the people of the State and of the meaning of the State Constitution in the light of such needs. Whether public policy is declared by the legislative or the judicial branch of a state's government is irrelevant to any Federal concern.

II.

The so called "responsible relatives" provisions struck down by the judgment below are incompatible with the principles of equal protection in the Fourteenth Amendment. They carve out a special group, identifiable only by virtue of a special consanguineal relation to a class of poor and afflicted persons who are therefore eligible for welfare assistance, for a species of special and discriminatory taxation of a regressive nature. The classification of the group of "responsible relatives" bears no reasonable relation to the purposes of welfare, is irrational and adverse to and incompatible with the interests of those receiving welfare assistance and hence to the entire community. There is no relation between welfare and the

liability of "responsible relatives" except that of the arbitrary and discriminatory reduction of cost to the public at the expense of the relatives of those persons receiving welfare assistance. This means that poverty is the sole criterion distinguishing between relatives who are "responsible" and those who are not within the meaning of the Code section struck in the judgment below. Finally, a comparison of welfare classifications such as the blind and the disabled as to whom the California legislature has totally eliminated and forbidden any "responsibility of relatives" provisions with others, such as the class of mental irresponsibles or all other classes of welfare recipients who, prior to the decision below as to whom "responsibility of relatives" was enforced, shows that the basic principle of equal protection was violated in that persons similarly situated with regard to the purposes of the law were not similarly treated.

Therefore, the Court should deny the writ as improvidently granted. If the Court should consider the merits, it should affirm the judgment below.

I.

The Judgment of the Supreme Court of California Rests Upon an Adequate State Ground.

Petitioner's assertion that the California Supreme Court's judgment rests on the Fourteenth Amendment is misleading and wrong. That judgment rests on independent State grounds, viz., California's evolving public policy "that the mere presence of wealth or lack thereof in an individaul citizen cannot be the basis for valid class discrimination" (*Dribin v. Superior Court*, 37 Cal. 2d 345, 348-50), the California Supreme Court's increasing

concern with the meaning which illuminates fundamental concepts of justice and equality when viewed in the light of recent social development and historical analysis*, and finally the public policy which emerges as a result of these processes working in the retort of the California Supreme Court's authority to construe and apply California's constitutional guarantees of equal protection.**

Analysis of the opinion below demonstrates that the California Supreme Court was consciously and expressly enunciating a new public policy which, while not unrelated to federal principles of equal protection, derives rather from the development of California's thought and experience than from any federal expression in the field of "relatives' responsibility" for state expenditures in support of mentally defective persons.

Thus, the Fourteenth Amendment is not mentioned even once as a basis for the decision below. To be sure, the principle of "equal protection" is the ground upon which that decision is expressly rested. But *California's Constitution,* no less than the federal constitution, re-

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*In its opinion below, the California Supreme Court said: ". . . we need not blind ourselves to the social evolution which has been developing during the past half century. . . . former concepts which have been suggested to uphold the imposition of support liability upon a person selected by an administrative agent from classes of relatives designated by the Legislature may well be reexamined." *Dept. of Mental Health v. Kirschner*, 60 Cal. 2d 716, 722. And see tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 Stan. L. Rev. 257, Part I, 16 Stan. L. Rev. 900, Part II, and the concluding portion of the study scheduled for publication in the spring 1965 issue of the Stanford Law Review.

**California's Constitution is full of provisions and references dealing with the principle of equal protection. See, *e.g.*, Calif. Const. Art. IV sec. 25; Art. XI secs. 5, 6, 11, 12, 14; Art. XII secs. 1, 5; Art. I sec. 11; Art. I sec. 21.

quires "equal protection" of law for all persons in California; and it is California's Constitution which contributes the adequate and independent state ground for the judgment below.

Indeed, Petitioner asserts that

> "[o]nly six years ago the court below upheld this same liability against charges of denial of equal protection in an exhaustive and comprehensive opinion. *Dept. of Mental Hygiene v. McGilvery,* 50 Cal. 2d 742." (Pet. Br. p. 15.)

Ironically, this assertion argues *against* the Petitioner for *McGilvery* expressly upheld the liability in question against an "equal protection" attack on the ground that "Article I, section 11 of the California Constitution [which] requires that all laws of a general nature have a uniform operation" had not been violated by the challenged legislation since the latter did not constitute an unreasonable classification of persons upon whom that law was to operate and such persons were not subjected to unequal burdens. (50 Cal. 2d at 754.) The California Supreme Court noted too, though only in passing as it were, that the equal protection clause of the Fourteenth Amendment "has been similarly construed." *(Ibid.) McGilvery* expressed a California policy now abandoned.

For our purposes, the significance of *McGilvery,* is the clear identification of Article I section 11 of the California Constitution as the basis of the holding in that case. Of course, a statute which *satisfied* the requirements of that constitutional provision would be incapable of violating the equal protection clause of the Fourteenth Amendment inasmuch as both constitutional provisions were said to have the same *minimal* require-

ments. But, it does not follow that California may not *raise* its requirements, under its own construction of its own constitution, *above* federal minima. If California were to do so, the result would be that challenged legislation could be held to violate the requirements of Article I section 11 of the California Constitution *whether or not* it would satisfy the requirements of the Fourteenth Amendment. Such a decision would, of course (as the decision below does), speak the rhetoric of "equal protection"; but it would not follow from that fact alone that the sole ground of such a decision would of necessity be the Fourteenth Amendment. Yet it is precisely this untenable conclusion which the Petitioner urges upon this Court. Even if the California Supreme Court believed that the State and the Federal Constitution, *both* required the judgment below, the existence of the independent State ground would constitute an adequate non-federal basis for the purpose of insulating the California judgment from review by this Court.

The California Supreme Court's opinion is not ambiguous as to the basis upon which it rests; that basis, given the line of authority cited, the reasoning employed, and the public policy declaring function being served, is clearly a California constitutional development rather than a federal constitutional compulsion.

However, as this Court has repeatedly held,

> "even if the State Court's opinion be considered ambiguous, we should choose the interpretation which does not face us with a constitutional question."

Black v. Cutter Laboratories, 351 U. S. 597.

But, having begged the question of the existence of an adequate state ground for the judgment below, Petitioner, with equal logic, seeks to enlist the assistance of Mr. Justice Holmes via his famous dissent in *Lochner*. Neither move would have escaped Holmes' quick condemnation as at best illogical. In addition, of course, they are misleading. For, if the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics, that amendment may be employed to defeat California's experimentation in the field of social welfare policy when dealing with mental illnesses any more than it may be employed to defeat New York's experimentation with regulating hours of work. Incongrously, the Petitioner would have this Court view a constitutionally authorized *departure* from a legislative pattern basically established by the poor laws of Queen Elizabeth as *preventing* social change, for that is the basis for the suggested analogy (assuming one might validly be made) between this case and *Lochner*. But, if Mr. Justice Holmes' dissent is to be invoked, its logic must be seen to cut quite the other way. For it matters not that here it is California's Supreme Court that has enunciated a new public policy rather than California's legislature. As this Court has previously noted,

> "The fact that California's policy is expressed by the judicial organ of the State rather than by the legislature we have repeatedly ruled to be immaterial. . . . For the Fourteenth Amendment leaves the states free to distribute the powers of government

> as they will between their legislative and judicial branches. . . . It is not for this Court to deny to a State the right, or even to question the desirability, of fitting its law to a concrete situation through the authority . . . given to its courts.'"
>
> *Hughes v. Superior Court,* 339 U. S. 460, 466-467.

What matters is that Petitioner is seeking the assistance of this Court to block and frustrate social change in circumstances which do not empower this Court to assert its jurisdiction. Quite independent of the merits of the change; regardless of the question whether and if so to what degree the merits are debatable; the facts are that California has made a change, that it has justified it in terms of its powers as a State, and that whether or not the Fourteenth Amendment compels such a change to be made, that Amendment certainly does not require or even authorize this Court to prevent it from being made. Indeed, Petitioner does not really argue that it does, for nowhere is it asserted that the elimination of "relatives responsibility" — were it done by California's legislature — would violate any concept of equal protection. Clearly, there is no sufficient basis for this Court's jurisdiction under 28 U. S. C. 1257 to be rested upon. The writ to the California Supreme Court should therefore be discharged as improvidently granted. *Cf. Wilson v. Loew's, Inc.,* 355 U. S. 597 (1958).

II.

The Equal Protection Clause of the Fourteenth Amendment Requires the Judgment Below to Be Affirmed.

In this case, as indeed in all cases of "relatives' responsibility", it is important to understand that the litigation arises from the claim by the State that the person receiving welfare assistance is too poor to pay for the services which the State has provided.* It is this basic fact, the poverty of the class of persons entitled to assistance under the State's welfare laws, which underlies the further classification of certain relatives of such persons as "responsible."

"Responsible relatives" are thus not those who have been assisted themselves under any welfare program of the State. Rather, they are involved only by virtue of liabilities imposed upon them by certain provisions of the welfare laws. These laws, in turn, have their origin in two different and sometimes conflicting purposes that historically were part of the system of the Elizabethan poor laws as adopted in Tudor England in 1601. These purposes are first, the relief and rehabilitation of persons suffering from poverty and its effects; second, the reduction of the cost of the welfare program to the public.

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*It is true that respondent disputes this claim; but the denial of the incompetent's poverty is really a quibble as may be seen from the fact first, that the total assets of the incompetent, $10,903.35, were derived from the sale of the incompetent's realty; and second, from the fact that even respondent admits that the incompetent's assets are insufficient to cover costs if the petitioner is correct in their assessment, and if not, then respondent agrees that those assets are insufficient to cover future costs. See Resp. Br. pp. 5-6.

From the very beginning, it has been clear that welfare laws have been a response to the social phenomena of gross and chronic poverty; but, in addition, they have, for reasons of historical character, been linked with notions of fault, the morality of the criminal law, and vigorous efforts to place the financial burdens of welfare programs upon the relatives of the poor.

Thus, the struggle to eliminate the counter-welfare provisions that historically have been linked with the welfare system has been long and to date only partially successful. Certainly we are today far removed from the early legal equation of poverty with viciousness. Though the United States Supreme Court could refer to the "moral pestilence of paupers" in 1837 (*City of New York v. Miln*, 11 Pet. 102, 142), it is probably more correct today to say that this Court agrees that

> "a man's mere property status without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States. 'Indigence' in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact-constitutionally an irrelevance, like race, creed or color." (*Edwards v. California*, 314 U. S. 160, 184-185, separate concurring opinion of Justice Jackson.)

Moreover, we have learned from recent decisions by this Court that fundamental rights may not be conditioned on ability to pay, though formerly it appeared that the same rights could so be conditioned. (*Griffin v. Illinois*, 351 U. S. 12; *Gideon v. Wainwright*, 372 U. S. 335.) These decisions appear to be part of a trend on the part of responsible governmental agencies to recognize the problems which flow from and are part of the

stubborn fact of poverty in our midst. Among those problems is the imposition of financial responsibility on the relatives of persons receiving welfare assistance in one form or another.

The recoupment of public expenditures for welfare assistance from the relatives of those assisted is in the nature of a regressive tax levied specially and discriminatorily upon persons selected on the basis of certain consanguineal ties to a class of persons too poor to pay for the assistance which society has concluded they require. The constitutional question is whether such a classification is violative of the guarantee of equal protection, and due process of law.

It is axiomatic that the guarantee of equal protection means that persons who are similarly situated with respect to the purposes of a constitutionally valid law must be similarly treated. It seems perfectly clear that it is constitutionally valid for a state to undertake to assist the blind, the disabled, the incompetent so that to whatever extent it is possible, these persons may be helped to overcome their difficulties and become self supporting members of the community and, failing that, that they may live within such bounds of decency and dignity as we are capable of helping them achieve. But, is it also constitutionally valid to say that the relatives of such persons, selected according to rules specially devised for the purpose, must bear the financial burden?

In what sense is it possible rationally to say that such a relative is situated differently from any other member of the public? It should be borne in mind that we are dealing here not with ordinary support obligations which apply to all alike, which are part of the civil family law of the state, but to support obligations which are

different from those of all except relatives of poor persons receiving welfare assistance, obligations found not in the Civil Code of the State, but in the Welfare Code.*

If we measure whether persons are situated similarly to others by asking whether they stand in the same relation to the purposes of a valid law; and, if the purposes of welfare laws may be said to be ameliorative and rehabilitative; then it would seem to follow that relatives stand in the same relation to those purposes as do other members of the community.

It is the state which has created welfare institutions just as it has created institutions of education and of fire and police protection. It is the community's interest which justifies the creation of such institutions and the assumption by the public of the responsibility for their support. Yet in the typical welfare case, the assumption of financial responsibilities which the state has created is sought to be shifted to so called "responsible relatives." Why would it not be equally rational or constitutional to shift such financial burdens to the class of those who are red-headed? It is no answer to argue as does the petitioner that tradition establishes the rationality of the obligation. In the first place, tradition is not evidence of rationality; much less of constitutionality. More deeply, petitioner fails to realize that the tradition of which he speaks is from its inception one which is incompatible with the guarantee of equal protection inasmuch as it did not seek to protect all persons equally, but sought to

*For a detailed and analytical comparison of the Civil and the Welfare family law of California, see tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, Part II, 16 Stanford L. Rev. 1900 (1964).

protect the comfortable from the costs of assisting the destitute and afflicted though the amelioration of their plight served all society: This is the clear meaning of the history of the origin and development of the Elizabethan poor laws and their effects in our system of welfare law in California and in other states today.*

Nor is petitioner's assertion that somehow the relatives of persons receiving assistance are specially benefited relevant to our constitutional inquiry. The "responsible relative" of a person receiving welfare assistance is no more specially benefited than is the relative of a person whose house has been saved from fire by the fire department specially benefited by the existence of a fire department. But, in any event, petitioner does not argue that provision of such "special benefits" should result in placing financial responsibility upon the relatives of the person whose house is saved in order to reimburse the community for the expenses incurred. For our analogy to be more apt however, we should focus on a class of persons who are too poor to have homes which contain built in protections against fire, and who, moreover, are too poor to pay for the services which they may require by virtue of their greater exposure to the hazards of fire. In this hypothetical situation if we were to say that their relatives of specified consanguineal degree must bear the financial cost of the fire prevention services which the community has provided then we would have a constitutional question similar to the one presented in the *Kirschner* case. What we would have to deal with

*See tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 Stan. L. Rev. 257 (Part I) and 16 Stan. L. Rev. 900 (Part II). (The concluding part of this work is scheduled to be published in the spring number of the Stanford Law Review.)

would be the simple provision that poverty ought to be the pivot for official class discrimination against relatives of poor persons. But the actual facts presented in the *Kirschner* case are more persuasive that the requirement that persons similarly situated be treated similarly has been violated by the law of "responsible relatives" and that therefore the decision of the California Supreme Court is compatible with the Fourteenth Amendment and indeed required by it.

Under the law of "responsible relatives" persons in need and relatives of persons in need of assistance are placed in a doubly invidious position. Separate and unequal to begin with (in contrast to persons and relatives of persons not in need) the law itself superimposes upon that condition further separate and unequal conditions, namely, conditions of liability and responsibility not imposed upon others. Moreover, the law imposes the emotional disadvantages inherent in adding to the extra-normal requirements of attention and understanding which arise in such circumstances, the frequently fearsome burdens of financial responsibility.

Not only is such a classification patently and invidiously discriminatory, but in addition to strict constitutional considerations, it also violates notions basic to the welfare purposes of the laws. Persons afflicted with a disability need their family; but what they need from them is love, understanding, acceptance, encouragement. These necessary responses are frequently impossible when the person who needs them is seen by his family as a financial liability, a drain on resources all too frequently inadequate to the requirements of simple dignity. In such circumstances, hate rather than love, mistrust rather than understanding, hostility rather than

acceptance, discouragement rather than encouragement are the responses which may be forthcoming.

These considerations serve to point up the incongruity, the incompatibility, between the welfare purposes and the cost-cutting purposes of the welfare laws as we inherited them from Tudor England. To the extent that the decision below has struck at those aspects of the law which did not further the purposes of welfare but which merely continued a pattern of financial discrimination against the poor and their relatives, it has at once served the interests of welfare and the principle of equal protection of the law.

Further evidence of the constitutional need and justification for the holding below striking down section 6650 of the California Welfare and Institutions Code, can be found in the prior pattern of welfare recipients' relatives who were exempted from any financial responsibility whatever for the services rendered by the State.

For many years, the National Federation of the Blind and the California League of Senior Citizens had campaigned against any and all "responsible relatives" laws for the reasons generally stated above. In California, in 1961, this campaign was partially rewarded by the total elimination from the blind and disabled assistance programs of the notion of "relatives responsibility" (Calif. Welfare & Institutions Code Secs. 3011, 4011).

This victory was only *partial*. There is no rational basis for eliminating "relatives responsibility" for the blind and disabled and not for the mentally irresponsible and indeed all persons who are being assisted in one way or another under the welfare laws. Again, one might with equal justice eliminate "relatives responsibility" for

all red-headed persons receiving assistance under the welfare laws. This victory but further emphasized the irrationality of the "responsible relatives" concept as a basis of classification.

Brown v. Board of Education eliminated irrational classifications based upon race in the field of public education. That was a great though partial victory for the principle of equal protection. It served to point up the irrationality of the claim of "separate but equal" racial discrimination as being compatible with the Fourteenth Amendment. It made clear that a law whose purpose included invidious racial discrimination simply could not be justified under the Fourteenth Amendment.

Similarly, it ought to be increasingly clear that a law whose purpose includes invidious discrimination based on poverty is incompatible with the Fourteenth Amendment as recent decisions of this Court dealing with laws which discriminate invidiously against the poor and destitute seem to indicate. *Griffin v. Illinois,* 351 U. S. 12; *Gideon v. Wainwright,* 372 U. S. 335.

Because the law of "responsible relatives" constitutes an irrational series of classifications based upon constitutionally improper purposes, it is appropriate and just that the California Supreme Court has, by virtue of the opinion below, struck it down as in violation of equal protection. The California Supreme Court has recognized that the principle of equality requires state functions benefiting all persons in the state to be supported by state funds. If welfare extended to the blind and disabled is such a state function; if welfare extended to the dangerously insane is such a state function; then welfare extended to the mentally infirm must also be

such a state function. This is what the decision below holds.

Whether one is a relative of a person within one or another classification of those entitled to state assistance, one should be treated similarly to those who are not so related for purposes of supporting such state programs. For, with regard to the basic undertaking of the state to assist the destitute and the afflicted, all stand similarly situated. Were it otherwise, it would be possible to argue that Negroes should reimburse the school districts which must with all deliberate speed cease their discriminatory practices for any necessary expenses incurred in the process since the Negroes might be said to constitute the primary beneficiaries of this process. Indeed, to further the analogy, Negroes without means to pay such expenses could then become a charge upon their relatives who could be made "responsible."

But of course the short answer to all this is that (as is becoming increasingly clear) welfare, like education, or the provision of fire and police protection, is a basic state function benefiting all who live within the state. Therefore, questions as to who derives special benefit (the mentally gifted from education; the person whose home is saved from the flames by the firemen; the person who is protected against a criminal assault by the policemen) are all irrelevant. "Similarly situated" persons are persons who stand in the same relation to the valid purposes of a law, not persons who stand to gain more or less from the implementation of such purposes.

It is such "similarly situated" persons who are required to be treated similarly under the Fourteenth Amendment. The decision of the California Supreme

Court does just that for the field of welfare law in California as it is related to the citizens of California. It may therefore be said to be both consistent with and compelled by the principles of equal protection in the Fourteenth Amendment.

Petitioner, perhaps realizing that the notion of "responsible relatives" cannot be defended upon grounds of logic, seeks rather to stand on tradition. He argues that the concept is traditional. So it is. But it is a tradition incompatible with constitutional guarantees. As the California Supreme Court said, "we need not blind ourselves to the social evolution which has been developing during the past half century." Part of this tradition, stemming from 43 Elizabeth Chapter 2, is the development of a dual system of family law, one for the poor, another for the comfortable. Different concepts of responsibility emerge for the poor and for the comfortable from an analysis of these systems. Insofar as "relative responsibility" concepts differ from the responsibilities found in the family law of the comfortable, the poor are seen, in this tradition, to be at once a class to be assisted and also a class to be discriminated against fiscally. In origin, the discriminatory treatment accorded the relatives of the poor had nothing to do with the humanitarian purposes or the assistance purposes of the poor law. It was merely an attempt to reduce the costs of the welfare program to the public by concentrating its burdens upon the poor and their relations. Thus, the "responsible relatives" provisions of the poor law traditionally have militated against the purpose of reducing the burdens of poverty and its effects: they have militated rather in favor of maintaining a wall of separation between the poor and the comfortable; and they have sanctified the separation

of unequals by laws appealing to morality without making it perfectly clear that the morality appealed to is sheer class morality, morality for the poor, not morality for all. Such a tradition is in essence incompatible with equal protection of the law.

For the foregoing reasons it is respectfully submitted that the decision below is in accord with and required by the equal protection principles of the Fourteenth Amendment.

Conclusion.

For the reasons stated in part I, the writ should be discharged as improvidently granted. But if this Court should consider the merits, the judgment of the court below should be affirmed for the reasons stated in part II.

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